



Case No. 08-cv-1405-JTM-KGG - Defendant-Producers' summary of recent issues and developments in advance of the upcoming status conference with the Court - Northern Natural Gas v. L.D. Drilling, Nash Oil & Gas, and Val Energy
Buller, Daniel

to:

ksd_gale_chambers@ksd.uscourts.gov

09/28/2017 03:17 PM

Cc:

"richard.olmstead@kutakrock.com", "cneller@ryanwhaley.com", "Mark Coldiron (mcoldiron@ryanwhaley.com)", "Goering, Jim", "Armstrong, Jim", "Brian Madden (bmadden@wcllp.com)", Jeffery Carmichael, Will Wohlford

Hide Details

From: "Buller, Daniel" <DBuller@foulston.com> Sort List...

To: "ksd_gale_chambers@ksd.uscourts.gov" <ksd_gale_chambers@ksd.uscourts.gov>

Cc: "richard.olmstead@kutakrock.com" <richard.olmstead@kutakrock.com>,

"cneller@ryanwhaley.com" <cneller@ryanwhaley.com>, "Mark Coldiron

(mcoldiron@ryanwhaley.com)" <mcoldiron@ryanwhaley.com>, "Goering, Jim"

<jgoering@foulston.com>, "Armstrong, Jim" <jarmstrong@foulston.com>, "Brian Madden

(bmadden@wcllp.com)" <bmadden@wcllp.com>, Jeffery Carmichael

<JCARMICHAEL@morrislaing.com>, Will Wohlford

<WWOHLFORD@morrislaing.com>

History: This message has been forwarded.

1 Attachment



2017-07-25 Memorandum Opinion denying NNGs Mot to Reconsider and Afig 20....pdf

Dear Judge Gale,

In a July 24, 2017 Minute Order, the Court suspended all deadlines in this case from and after May 30, 2017, "to enable the parties to evaluate this matter in light of recent developments in related cases." (Doc. 638.) The "related cases" referred to are the parallel proceedings, both filed by Northern; namely, one Kansas-state court proceeding in Pratt County (2009-CV-111, App. No. 17-118239-A), and one federal condemnation proceeding (D. Kan. No. 10-1232, App. No. 15-3272). The Court ordered the parties to succinctly summarize "the issues and developments which they believe will be important for the status conference and proposals for a new scheduling order, so that to the extent possible, the Court has advance notice of the position of the parties." (Doc. 638.) In accordance with that Order, the Producers respectfully submit the following summary of significant developments that have occurred in both the Kansas State court proceeding and the federal condemnation proceeding, all of which bear directly on the parties' claims in this case:

- At the time the Court suspended all deadlines in this case, counsel for the Producers were preparing a petition for rehearing and rehearing en banc in the Tenth Circuit relating to that court's ruling on ownership and rights to gas underlying the Producers' wells on and after June 2, 2010, the date that FERC issued the regulatory certificate authorizing the expansion of Northern's storage field.
- Just days before the Producers filed their petition for rehearing in the Tenth Circuit, the Pratt County district court in the parallel Kansas State-court action finally issued its ruling denying Northern's motion to reconsider, and affirming its original order that the Producers had the right to operate their wells after the June 2, 2010 FERC Certificate—a ruling on which the parties had been waiting for just under three years. That ruling is attached to this email for the Court's reference.

- Notably, the Pratt County district court certified its ruling as a final, appealable order pursuant to K.S.A. 60-254(b), and Northern did appeal that order on August 23, 2017.
- With the issuance of the State court order, there are now Kansas-State and Federal rulings from separate lawsuits that stand in direct conflict, both addressing identical unresolved issues of Kansas law relating to Northern's storage field, migrating storage gas, and the rights to and ownership of that gas.
- Following Northern's appeal of the Pratt County case, the Producers filed a motion to transfer the appeal directly to the Kansas Supreme Court, which Northern opposed. That motion remains pending, but regardless of whether it is ultimately granted, the Pratt County case is currently proceeding through the Kansas appellate courts.
- Meanwhile, the Tenth Circuit denied the Producers' petition for rehearing and rehearing en banc; however, the Producers have since filed a motion to stay issuance of the Tenth Circuit's mandate pending their petition for a writ of certiorari in the U.S. Supreme Court, which motion was fully briefed September 12, 2017, and remains pending at this time. Regardless of whether the Tenth Circuit stays issuance of the mandate, the Producers will be filing a petition for certiorari in the U.S. Supreme Court relating to the same legal issues that are pending in the Pratt County appeal.

The above developments bear directly on the parties' claims in this case. First, Northern's nuisance claim necessarily contains a "reasonableness" component, PIK Civil 4th § 103.06, and the Producers' right and title to the gas certainly bears on the reasonableness of their conduct during the relevant timeframe. Moreover, in contrast to the Tenth Circuit's current ruling, the Pratt County district court held that the Producers had every right to operate their wells on and after the issuance of the June 2, 2010 FERC Certificate. This is directly relevant on a number of Northern's pending claims in this lawsuit, a fact of which Northern is well aware. The most obvious example is Northern's conversion claim, which seeks compensation for gas produced on and after issuance of the June 2, 2010 FERC Certificate, i.e., **the very same money that the Pratt County court held Northern owed the Producers.** (See Northern's Response to Nash's Motion for Judgment on the Pleadings, Doc. 631, at 4 (May 17, 2017) (Northern discussing its conversion claim as being related to right and ownership of post-June 2, 2010 gas and the parallel condemnation action). See also Northern's Third Am. Compl., Doc. 564, at 17-22 (Aug. 11, 2016).)

The above developments also bear directly on the Producers' defenses to Northern's claims as well as the Producers' counterclaims in this lawsuit, many of which specifically relate to their right under Kansas law to operate their wells after the issuance of the June 2, 2010 FERC Certificate.

Because it is "closely related to [the] condemnation proceeding," this case was previously stayed by Judge Bostwick (Doc. 474 at 2), and Judge Marten. And though Northern will almost certainly argue that its nuisance claim is independent of the issues present in the parallel proceedings, that is simply untrue, as noted by Judge Marten when denying Northern's previous motion to lift the stay. (Doc. 550 at 7 (acknowledging that "[t]he question of whether Northern had title to storage gas that was in the Expansion Area after June 2, 2010 (both Judge Belot and the state court have ruled it did not), may be a factor in whether a nuisance existed . . . under Kansas law").

Indeed, the Kansas Supreme Court in the *ONEOK* decision rejected Northern's "nuisance" claim:

Northern concedes that section (b) primarily restricts the rights of interest owners of the surface lands under which injected gas lies. Nevertheless, Northern ascribes broader meaning to the statute based on the two disjunctive phrases italicized above. Specifically, Northern contends Nash and L.D. created "pressure sinks" which caused storage gas to migrate outside Northern's

certificated area and toward Nash's and L.D.'s wells. Based on these alleged activities, Northern concludes Nash and L.D. are “persons” who have “otherwise interfere[d]” with Northern's possession of the gas.

Northern's “interference” argument, while initially appealing, is unpersuasive for two reasons. First, the italicized portion of section (b) upon which Northern relies, like the remainder of section (b), applies only to “such gas.” Unquestionably, the phrase “*such gas*” in section (b) references the gas described in section (a) above. Second, as we have determined, the gas described in section (a) does *not* include gas which has migrated beyond the certificated boundaries of the storage site.

Additionally, we perceive a disconnect between Northern's allegations of conversion against ONEOK and Lumen and Northern's allegations of “interference” against Nash and L.D. based on the language of section (b). We note that in the parallel federal litigation described above, the United States District Court for the District of Kansas eventually granted Northern's motion for a preliminary injunction, ordering Nash and L.D. to shut in certain wells and cease production by February 2011. The district court in that case relied, in part, on the likelihood that Northern might succeed on *its nuisance claim against Nash and L.D., a claim which arises from the same “pressure sink/interference” argument Northern presses here. Northern Natural Gas Co. v. L.D. **1121 Drilling, Inc., 759 F.Supp.2d 1282 (D.Kan.2010), aff'd 697 F.3d 1259 (10th Cir.2012).*

N. Nat. Gas Co. v. ONEOK Field Servs. Co., 296 Kan. 906, 927, 296 P.3d 1106 (2013) (emphasis added).

In both the Kansas State court proceeding and in the condemnation action, that issue is not finally resolved and remains hotly disputed between the parties on appeal in those cases. Simply put, the resolution of the condemnation case and, even more importantly, the Pratt County appeal, will directly affect the parties' rights in this case.

Additionally, proceeding with the present case will impose significant financial burdens on all parties—in particular the defendants, whose imminent expert expenses will be substantial. All of those expenses could be for naught depending on how the Pratt County case and the condemnation case are finally resolved. And such waste will likely be compounded if discovery proceeds at this time because the experts' opinions regarding the producers' defenses, the producers' counterclaims, and Northern's damages claims are all directly impacted by who has the right and title to post-June 2, 2010 gas.

Northern elected to file multiple lawsuits that address identical legal issues in federal and Kansas State forums at the same time, and waiting for the proper and final disposition of those overlapping issues by those courts is an appropriate and economic use of this Court's (and the parties') resources.

In light of the above, the Producers believe the present case should remain stayed pending the resolution of the Pratt County lawsuit by the Kansas appellate courts and the resolution of the condemnation proceeding by the U.S. Supreme Court. If the Court disagrees that this case should remain stayed, the Producers will expeditiously provide to the Court a proposed case schedule.

Best regards,

Daniel

Daniel J. Buller

FOULSTON SIEFKIN LLP
9225 Indian Creek Pkwy. #600
Overland Park, Kansas 66210
(913) 253-2179 – phone
(866) 347-9613 – fax
www.foulston.com

IMPORTANT: This communication contains information from the law firm of Foulston Siefkin LLP, which may be confidential and privileged. If it appears that this communication was addressed or sent to you in error, you may **not** use or copy this communication or any information contained herein, and you may **not** disclose this communication or the information contained herein to anyone else. In such circumstances, please notify me immediately by reply email or by telephone. Thank you.